

Lessons of Comparative Criminal Procedure: France and the United States

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The criminal justice system of the United States is in trouble. Police, prosecutors and prisons are unable to cope with crime, which has reached socially unacceptable proportions. In an attempt to improve our system, some observers have looked abroad for models from whose adoption here we could profit. The author examines one such proposal, inspired by the French system of criminal procedure, and finds it lacking in wisdom. In return, he offers suggestions capable of being implemented within the framework of our own Anglo-American legal tradition and which, if adopted, would demonstrate a determined national resolve to control crime and reduce the fear of it which currently permeates American society. Comparative law study should be encouraged, but those who engage in it should strive to be realistic in urging the transnational implantation of legal institutions which have been nourished by centuries of experience in their native soil.

It is almost universally conceded that the criminal justice system of the United States is in serious trouble. Alarmed by annual reports reflecting a steadily progressing rate of increase in the incidence of crime, the public is demanding that something be done.¹ Our criminal justice system, which should effectively pun-

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1. According to the preliminary 1980 FBI Uniform Crime Index, violent crime increased by 13% nationally. The statistics were released barely 24 hours after the attempted assassination of President Reagan. L. A. Times, Apr. 1, 1981, p. 1, col. 4.

ish those guilty of crime, is seen by many to be inefficient in carrying out this fundamental task. Instead of swift arrest, prompt trial, certain punishment and finality of judgment, the system we depend on for our safety is encumbered by a plethora of procedural pitfalls which too often insure that the offender, even if apprehended, goes unpunished.

Proceeding from the standpoint that the police, the courts and the correctional institutions are failing to adequately protect the public from crime and the fear of crime, what is to be done? Governments, it should be remembered, are instituted for the primary purpose of protecting the person, honor, property and status of those who owe allegiance to them. The clear need, therefore, is for more governmentally guaranteed public safety. In the United States we are justifiably proud of our heritage of individual freedom and liberty. Unfortunately, the statutorily and constitutionally guaranteed liberties enjoyed by honest, productive elements of American society are also used by anti-social elements to conceal and further their criminal activities. The sensitive policy maker is therefore placed on the horns of a dilemma: how can the state expand its crime repressive activities without at the same time unreasonably restricting the freedom and liberties of all its citizens?

In searching for ways out of this dilemma, can we profit from the experience of other countries? In particular, to what extent can we adopt institutions and procedures from abroad as remedial solutions to perceived defects and shortcomings in our own system of criminal justice? Can we, as suggested by Professor Lloyd L. Weinreb in a recent book,² switch from an accusatorial to an inquisitorial criminal procedure, drawing on the experience of France for guidance and inspiration? Since these questions are of obvious significance in evaluating the utility of the study of foreign and comparative law, a field in which Pierre Azard distinguished himself so well, it is fitting to analyze Professor Weinreb's proposals and to comment on the contribution which they make to the solution of our national crime problem.

Finding the condition of American criminal justice completely unsatisfactory, Professor Weinreb advocates the adoption by the United States of criminal procedures, the nature and function of which are quite similar to those long in use in France. Indeed, in his Preface the author acknowledges an intellectual debt to "Continental" criminal procedure, which he concedes has provided a direction for his thinking. According to Weinreb, the straightfor-

2. L. WEINREB, *DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES* (1977) [hereinafter cited as WEINREB].

ward function of the criminal process is "to determine criminal guilt with a view toward imposing a penalty." His book, which is divided principally into two parts, examines the existing process, finds it inadequate, and proposes an alternative model. In the first part of his book the author critically analyzes the American criminal justice system, taking the reader step-by-step through the incidents of police response, arrest, investigation, interrogation, prosecution, plea bargaining, trial and sentence. This segment of the book is written in an engaging and extremely interesting style, complete with references to illustrative material based on case law, sociological data and hypothetical scenarios.

It is clear throughout, however, that Weinreb is thoroughly disenchanted with our criminal justice system. For one thing, and this is probably the lynchpin in Weinreb's construction of an alternative model in the second part of his book, the author believes that the police are improperly employed. Instead of concentrating on what they do best (keeping the peace), the police are asked to perform tasks (investigating crime) for which they are poorly trained. Our courts, so says Weinreb, are unrealistic in expecting patrolmen to act in a neutral and detached manner in making often swift discretionary decisions involving the Constitutional guarantees of those with whom they come in contact in carrying out their peace-keeping functions. A prime example is represented by the U.S. Supreme Court's requirement that, in order to guarantee an arrested suspect's Fifth, Sixth and Fourteenth Amendment rights under the U.S. Constitution, a policeman must warn him that (1) he has a right to remain silent; (2) that any statement he does make may be used as evidence against him; and (3) that he has a right to the presence of an attorney, either retained or appointed.³ These warnings must be given prior to any custodial interrogation. Failure to do so, and to obtain from the suspect a valid waiver of his rights as stated therein, makes any admission or confession by the suspect inadmissible as evidence at his subsequent trial. Weinreb notes that the police have "understandably" not been willing or able to play the role of calm, detached and neutral magistrates engaged in the dispassionate and objective search for truth. Police questioning, it must be assumed, is normally done by peace officers engaged in the often competitive enterprise of ferreting out crime.

3. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

Reasoning logically, Weinreb admonishes that we cannot have it both ways. If we desire to make trial use of evidence obtained by police questioning, then we must be prepared to run the risk that varying degrees of coercion will be used by the police in persuading a suspect to answer their questions. If, on the other hand, we are serious about eliminating the coercive aspects of custodial interrogation, then requiring a reading of the four-fold *Miranda* warnings will not suffice. Weinreb's solution: eliminate police questioning of the suspect entirely. After making an arrest, the police would be required to bring their prisoner straightaway to other public officials for further investigative and prosecutorial processing.

Who would these officials be? Since they do not exist now, Weinreb proposes to create them, a change which, as he candidly and correctly notes, would have "large consequences":

We need, then, to establish the office of a magisterial investigator, or investigating magistrate, whose responsibility for investigating and preparing a case for prosecution is distinct from the work of the police. There is an investigating magistracy in most countries. In this country, the concept may suggest to many persons "inquisitorial" techniques of criminal process that we reject. As an initial matter, however, the establishment of such an agency authorized to do only what the police are already authorized to do would be a clear improvement. As between the police station and a public agency with the neutral, nonforceful trappings of the judiciary, the choice is obvious. So too, the choice is obvious between removal of a person to a police station, where he must submit to police officers whose primary authority, training, and identity are bound up with the use of force, and his immediate release into the custody of a judicial officer trained for the tasks assigned to him.⁴

After the prisoner has been turned over to the custody of the investigating magistrate, Weinreb presumes that a magisterial interrogation will normally take place:

The magistrate should advise the suspect that he is not obliged to say anything about the crime whether he is guilty or not, and that there will be no effort to make him say anything by manipulation or trickery. The advice should be given substantially and not as a formal preliminary to increasingly intensive questioning, as it too often is at the police station. But it would also be normal and proper for the magistrate to state that it is his task to investigate the crime and that he is asking questions as part of his recognized official duties. Questioning should normally be conducted in the presence of a suspect's lawyer, to reassure the suspect and us that the magistrate's questions did not exceed proper inquiry. The lawyer should be permitted with great liberality to suggest lines of questioning to the magistrate, to point out ambiguities in questions, and to help the magistrate resolve confusions. It would not be any part of his function at the hearing to advise his client to be silent; nor would it be proper for him to give that advice to his client privately. On the other hand, if the magistrate browbeat his client or were overbearing, it would be the lawyer's duty to object then and later. It should not be a bar to questioning a person that his lawyer is not present; but if he declined for that reason to

4. WEINREB, *supra* note 2, at 42.

respond, that should be an end of the matter, simply because he does not have to respond whatever his reasons.⁵

Once the investigation is complete, the magistrate would determine whether or not the suspect should be held for trial, and if so, the crime or crimes for which he had found sufficient evidence of guilt:

If he has found proof of a crime, he should close the investigation with an order making a specific accusation against the defendant. The accusation should not be merely a formal preliminary to judgment, but the magistrate's *legally competent finding that the defendant is guilty of the crime specified*.⁶

The file of the magistrate would contain all the relevant evidence brought out during the investigation. In its capacity as the investigative record of the case, it would be entirely available to the trial court "as continuing substantiation of the accusation."⁷

A criminal trial under Weinreb's alternative model would look quite different from anything with which Anglo-American attorneys are presently working. Since plea bargaining would be eliminated, all prosecutions would necessarily go to trial, but the trial itself would be short: "there would be few proceedings that were not concluded within a day."⁸ The reason for this is that the adversarial role of trial counsel would be greatly diminished. There

5. *Id.* at 130 (footnote omitted).

6. *Id.* at 135 (emphasis added). If Weinreb's proposals were adopted, and the accusation were "based on the magistrate's own conclusion that beyond a reasonable doubt the defendant is guilty," *id.* at 136, what would be left of our cherished presumption of innocence at the time of the trial? The trial, which Weinreb refers to as a "proceeding," would be more like an appeal by the accused from what realistically appears to be a verdict of guilty already reached by the investigating magistrate.

7. *Id.* at 135. Adoption of this proposal would have dramatic impact on the current U.S. law of criminal evidence. Since under Weinreb's alternative model there are no exclusionary rules to encumber the magisterial investigation, the file would contain all kinds of information, relevant and irrelevant. Although one could probably assume that the magistrate would exercise sound professional judgment in deciding what and what not to put in the file, it would be safe to assume that while most information in the file would be probative, material, and constitutionally unobjectionable, some would not. Weinreb's book is silent on these and other evidentiary questions, including search and seizure. In an Appendix he tries heroically to reconcile magisterial interrogation of the prisoner with the Fifth Amendment privilege against self-incrimination. An addendum thereto addressing the problematics of the interrelationship between the magisterial investigation and the Fourth Amendment guarantee against unreasonable searches and seizures would have been interesting and perhaps enlightening. There are, of course, other constitutional issues raised by Weinreb's alternative model, e.g., the Sixth Amendment right to counsel.

8. *Id.* at 143 (footnote omitted).

would be no *voir dire*, no trial by jury. Instead, a ten man court composed of a presiding judge, two members of the bar and seven lay persons would decide all questions of law and fact. The role of the presiding judge, who would have already familiarized himself with the magistrate's file and who would direct the presentation of the evidence, is critical:

At the outset, he should outline the case against the defendant and the evidence for and against his guilt. The defendant should then be allowed to make a statement of his own, whether to outline the evidence himself or offer an explanation or simply to assert himself within the limits of decorum. Witnesses who were examined by the magistrate should then testify unless excused by prior stipulation of the defendant. The order in which witnesses testify should be determined by the judge, who should also indicate to witnesses the desired subjects and scope of their testimony. They should be asked to testify directly about the crime, questions being used to elicit the information and guide a witness toward what is relevant. The defendant should be included among the list of potential witnesses but decide himself whether he will testify or not. The members of the court should ask questions freely to resolve inconsistencies and ambiguities or to review points that they want clarified. The defendant also should be allowed to question a witness and to challenge or contradict him. When it may be helpful to resolve an issue, witnesses should confront one another. The role of the prosecutor and defense counsel during the presentation of witnesses should be that of advisers to the court. They should be allowed to recommend that witnesses be heard in a particular order or additional witnesses be heard, to recommend questions, and to suggest lines of inquiry to ensure that favorable evidence is not overlooked.

After all the witnesses have been heard, the defendant should have another opportunity to address the court as he chooses. The prosecutor and defense counsel should also address the court to summarize the evidence and make any additional argument or plea. Following further discussion of the applicable legal principles as that is necessary, the court would withdraw to reach a verdict.⁹

Such, in broad outline, is the way in which Weinreb would structure his alternative model. Frenchmen may perhaps be flattered to discover so many resemblances between it and the French criminal procedure system, but does it really represent a practical solution to our contemporary problems? It may also be useful as a teaching tool in a law school seminar on 'Criminal Procedure and Social Policy,' but will it ever be enacted into law?

If the United States has an ideology, then surely pragmatism must be included as part of it. Generally speaking, we are open to new ideas. We encourage initiative in science and technology in order to keep our country moving forward. But our strength lies not in philosophically debating whether a proposed idea is theoretically sound, but rather in empirically calculating whether it will work. Weinreb's ideas will never be tendentiously accepted in the United States because they represent too radical a change

9. *Id.* at 142-43.

in our present way of doing things. Social experimentation is sometimes necessary but it never proceeds without risks. In effect, Weinreb would pull up by the roots a whole row of our traditional criminal procedural institutions and replace them with hybrid transplants imported from France. Some French legal institutions, like some French wines, do not travel well. The institution of the French *juge d'instruction*, developed over centuries of experience in dealing with Roman law-related methods of judicial-inquisitorial prosecution of crime, would cause much confusion and mischief if ever introduced into the United States.

Professor Weinreb is aware that his proposals will meet with serious opposition. As he notes, "[l]arge institutional changes of this kind are not easily accomplished. . . ." ¹⁰ In his "more hopeful moments," however, he prefers to think of them "as both prescriptive and predictive."¹¹ This writer is unable to share in Weinreb's cautious optimism. To be sure, his alternative model would theoretically bring certain welcome advantages, such as a shorter length of time between arrest and conviction. But it presupposes the existence in the United States of several presently non-existent factors which are indispensable for its success. These factors, such as professionally trained cadres of investigating magistrates, may not be legislatively manufactured and would not function in an environmental vacuum. Of vital importance in the success of any legal institution is the attitude and experience of those who relate to it professionally and socially. Such cultural attitudes and traditions are the product of centuries of development. It may be true that at one time in the distant past the Anglo-Saxon and Continental systems of criminal procedure were identical,¹² but in the seven centuries which followed the Fourth Lateran Council's Papal ban on clergy participation in trial by ordeal, the two systems have proceeded along quite different paths. The broad outlines of this development (trial by jury in England; inquisitorial proceedings on the Continent) have been thoroughly explored elsewhere.¹³ It is important to emphasize,

10. *Id.* at 146.

11. *Id.*, Preface, at xi.

12. G. MUELLER & F. LE POOLE-GRIFFITHS, *COMPARATIVE CONTINENTAL CRIMINAL PROCEDURE* 3 (1969).

13. Mannheim, *Trial by Jury in Modern Criminal Law*, 53 L. Q. REV. 99 (1937); A. ESMEIN, *A HISTORY OF CONTINENTAL CRIMINAL PROCEDURE* (1968); Ploscowe, *The Development of Present-Day Criminal Procedures in Europe and America*, 48 HARV. L. REV. 433 (1935).

however, that Anglo-American and Continental European attitudes toward authority and structures of government have exercised a profound impact on the formation and operation of legal institutions. One need not adhere to Savigny's view that law is a product of "internal, silently-operating powers"¹⁴ to realize that the culture, language and law of a nation are largely the product of its historical experience. This point was very well made in a perceptive article by Professor Damaska in which, *inter alia*, he analyzes the interrelationship between political theory and criminal procedural institutions.¹⁵ He concludes that the Anglo-American and Continental European systems "differ significantly in the extent of the centralization of authority, the degree of its rigidity, the choice between determinate and flexible rules, the importance attached to formality and documentation, and the types of behavior expectations held by government officials."¹⁶ The main reason, therefore, why Weinreb's alternative model will never work in the United States is not that it is just another professorial pipedream, but rather that it strikes too radically at the roots of what is essential and not accidental in our system of criminal procedure.

On the positive side, Professor Weinreb's book has contributed to the on-going debate concerning the desirability of introducing changes into our criminal justice system.¹⁷ If we feel constrained to reject Weinreb's proposals as unwise, what can be offered as a substitute? First of all, it appears that Weinreb and others have

14. Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, in READINGS IN JURISPRUDENCE 87, 88 (J. Hall ed. 1938).

15. Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 532-39 (1975).

16. *Id.* at 543.

17. Skeptical of Weinreb's assumption that an inquisitorial model would really eliminate police and prosecutorial discretion, plea bargaining and other assorted ills perceived to encumber the American criminal justice system, Abraham Goldstein and Martin Marcus, after a *Blitzbesuch* during October and November 1975 in Italy, Germany and France, concluded that it is a "myth that judges conduct or supervise police investigation." Goldstein & Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany*, 87 YALE L.J. 240, 250 (1977). "The plain fact is that examining magistrates are no more likely than comparable American officials to leave their offices, conduct prompt interrogations of witnesses or of accused persons, or engage in searches or surveillance. For such tasks, they rely almost entirely upon the police." *Id.* In a reply, John Langbein and Lloyd Weinreb dispute Goldstein and Marcus' findings, not because they are based on too small a sampling of empirical field study data (principally interviews and court visits), but rather because they fail to review the formal non-English language legal literature. Langbein & Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549 (1978). See also Goldstein & Marcus, *Comment on Continental Criminal Procedure*, 87 YALE L.J. 1570 (1978), illustrating how a difference in methodology (law on the books versus law in action) is capable of producing a difference in opinion which in substance is probably more apparent than real.

been finding fault with the American criminal justice system for the wrong reasons. The trouble lies not with a lack of formal institutional controls over police and prosecutorial discretion, but rather with the failure of the system to prevent the commission of crime and to swiftly punish those for whom deterrence has not been successful.

In order to make more effective the crime-repressive function of our criminal justice system, several things should be attempted. First, it will be necessary to raise the public consciousness concerning the need for widespread popular support for our law enforcement authorities. In some circles, this will not be easily accomplished. There are too many individuals in the United States whose sympathies lie with criminals or with those whose fringe activities bring them into contact with criminals. What is needed, therefore, is a movement to counter the "criminal law revolution" of the 1960's which went so far in creating a social and legal environment friendly to the criminal element. Once the public becomes convinced that the spiraling crime rate is socially and politically unacceptable, serious measures to make our criminal justice system a more effective crime control instrument will be introduced. As Bismarck taught us, politics is the art of the possible. If the American people truly desire a criminal procedure consistent with the values embodied in a "crime control model,"¹⁸ there is no reason why the coordinate branches of our government cannot be persuaded to make the necessary changes.

In the recent past, judicially shaped rules of criminal procedure, often linked to general principles of constitutional law, have placed obstacles in the path of efficient crime control. What is presently needed is a change in the way in which our governmental officials think about crime. Society can no longer continue to pay the costs associated with a "due process model" of criminal procedure. We have due processed ourselves into a legal-political cul-de-sac. No one can condone the use by the state of unnecessarily harsh, brutal or indiscriminate methods in enforcing the criminal law. Law enforcement personnel responsible for impermissible conduct should be administratively discharged, disciplined or criminally punished. The sanctions against official misbehavior which are so often pronounced by our courts (inadmissibility of reliable but improperly obtained evidence) run

18. H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968).

counter to the felt necessities of the times. To be sure, there is much truth in Frankfurter's dictum that "[t]he history of liberty has largely been the history of observance of procedural safeguards."¹⁹ It is equally accurate to note, however, that the development of civilization may realistically be measured in terms of the degree of security which the government has been able to provide to the governed. In order to enhance this security in contemporary U.S. society, action is required at two levels: (1) legal policy, and (2) social morality.

In formulating legal policy, legislators, judges and administrators need to develop a victim-oriented jurisprudence. It is wrong to show pity to the rapist but not to the raped. Those who believe in the inherently good nature of criminals would find it difficult to retain these beliefs if they ever had been on the receiving end of a violent criminal attack. Social and physical science is incapable of satisfactorily explaining the etiology of crime. For purposes of imposing punishment, it is enough to assume that crime is caused by criminals. Evidentiary standards should be liberalized to permit more evidence to go before the trier of fact. Exclusions now possible under *Miranda*²⁰ and *Mapp*²¹ should be eliminated by appropriate constitutional interpretations in the case law.

Once having determined that the defendant committed the prohibited act in the prescribed blameworthy frame of mind, the trier of fact should return a finding of guilt, and punishment should be forthwith imposed. Justice delayed is justice denied. Other innovations which would serve to protect the public include the mandatory revocation of bail if the defendant should commit a crime while awaiting trial and the imposition of more severe sentences for offenses committed while the perpetrator is out on bail or parole. Recidivists, whether misdemeanants or felons, should be awarded increased sentences. The death penalty should be applied without the inhibitions provoked by the strange idea that it represents cruel and unusual punishment under the U.S. Constitution.

The above suggestions are simply illustrative of the type of legal-political change that is necessary if our criminal justice system is to be improved. No institutional changes are required. If conscientiously implemented, new rules reflecting increased severity in the substantive and procedural aspects of criminal law will go a long way to make safer America's streets, parks and homes.

19. *McNabb v. United States*, 318 U.S. 332, 347 (1943).

20. *Miranda v. Arizona*, 384 U.S. 436 (1966).

21. *Mapp v. Ohio*, 367 U.S. 643 (1961).

Concerning the second aspect of my proposal to augment security against crime, there must be a marked improvement in the social morality of the American people. The goal of effective crime control will never be achieved unless we are able to strengthen the civic virtue and moral fibre of our people. This can be done by encouraging charity and respect.²² Charity is important because through it the citizen develops a positive attitude of cooperation and willingness to assist his fellow man, individually as well as through social and state institutions. Community involvement from one's place of work, worship or residence is an integral part of this caritative activity. The individual must be convinced of the need to develop a sense of belonging to a community or group whose praiseworthy civic and cultural goals he is firmly committed to defend and to promote.

By respect is meant respect for the authority of the government. A good citizen's attitude toward those who are entrusted with the often hazardous duty of enforcing the criminal law should be characterized by respect commingled with a touch of fear. It is an uncontestable fact that social morality is nourished by fear, which is itself a wellspring of conscience. In order to reduce the fear that honest citizens have of criminal elements, it will be necessary to increase the respect which all citizens have for the law. Since a good citizen respects the law and fears the consequences of violating it, a criminal justice system which fairly, efficiently and swiftly punishes violators serves to reinforce his determination to work industriously at a lawful occupation of his own choosing.

22. "[T]here is nothing outside a man which by going into him can defile him. . . . What comes out of a man is what defiles a man. . . . [O]ut of the heart of man. . . ." *Mark* 7:15, 20-21.

